Supreme Court, U.S.
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No. 99-1069

IN THE

SUPREME COURT OF THE UNITED STATES

THE MONTGOMERY COUNTY PUBLIC SCHOOLS
and
MEMBERS OF THE
MONTGOMERY COUNTY BOARD OF EDUCATION,
Petitioners,

v.

JEFFREY EISENBERG and ELINOR MERBERG,
on behalf of JACOB EISENBERG,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Should the Court grant petitioner's writ of certiorari for a decision that presents no conflict with the decisions of this Court or any court of appeals and is in fact consistent with legal guidance issued by the courts?

CORPORATE DISCLOSURE STATEMENT

Respondent Jacob Eisenberg, and his parents, Jeffrey Eisenberg and Elinor Merberg, are individuals with no parent companies or non-wholly owned subsidiaries to be disclosed pursuant to Rule 29.6.

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INTRODUCTION

This case is about the Montgomery County Public School's (MCPS) use of racial classifications to bar a number of students, including respondent Jacob Eisenberg, from transferring schools within the system solely because of their race. This bar violates the long-established rule set forth by Justice Powell in *Regents of the University of California v. Bakke*, 438 U.S. 265, 318 (1978), that a public policy to promote diversity cannot foreclose the availability of a benefit to an individual simply because the person "was not the right color." Jacob and MCPS agree that school boards need broad discretion to manage their affairs. However, those affairs cannot be administered in an unconstitutional manner as MCPS did here.

The Fourth Circuit reached the straightforward and quite narrow conclusion that MCPS's use of racial bars in its transfer policy was unconstitutional based on uncontroverted evidence and admissions by MCPS that MCPS applies the bar to students of various races across the county.[1] The Fourth Circuit decision is consistent with the one other court of appeals decision that has considered this narrow issue, and further, is squarely within the teachings of this Court. For these reasons, respondent urges the Court to reject this petition for a writ of certiorari. A denial of the petition will give a powerful incentive to those school districts seeking to promote diversity to begin at the earliest possible date to devise lawful policies to achieve this worthy goal.

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[1] MCPS acknowledged in a submission to the Maryland State Board of Education that there are no disputes of material fact in this case (JA 241). MCPS did not identify any unresolved disputes of fact that are material to the disposition of this case in its petition for writ of certiorari. The Fourth Circuit recognized that there are no material facts in dispute. (MCPS App., 17a-18a, 20a.).

STATEMENT OF THE CASE

A. The Transfer Policy

On March 30, 1998, Jacob Eisenberg's parents submitted a request to MCPS to transfer Jacob from his assigned school of Glen Haven Elementary School to Rosemary Hills which offers a math and science magnet program. JA 29.[2] Jacob's parents believed their son had shown an aptitude for math and science and wanted to place him in an academic setting that addressed his aptitude. JA 30, 33. On May 15, the request was denied because of the "impact on diversity" at Jacob's assigned school of Glen Haven. JA 29. The decision was consistent with MCPS' written transfer policy which showed that white students were not allowed to transfer out of Glen Haven. JA 21.

The written transfer policy explained that "[e]ducation is most effective in a diverse, integrated setting." JA 18. Other transfer documents elaborated: "Integrated scholling has inherent education value from the standpoint of education's role in a democratic society. . . . Diversity brings different viewpoints and experiences to classroom discussions and thereby enhances the educational process. . . . Diversity is thus a valuable resource for teaching students to become citizens in a multi-racial/multi-ethnic world." JA 244. In its representations to the District Court, the Board justified its transfer policy on the basis of diversity and avoidance of segregation. JA, 190-91.

MCPS implemented its policy by "develop[ing] a diversity profile for each school. This profile compares

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[2]The "JA" citations are to the Joint Appendix submitted to the Fourth Circuit.

the racial/ethnic composition of each school to the average County-wide range for that racial/ethnic group, and examines past increases and decreases in that group's population at the school." MCPS App. 34a. In March 1998, at the time of Jacob's transfer application, the proportion of white students in the Glen Haven pupil population was 24% compared to 39% in 1994. MCPS App. 35a. The proportion of white students in the county-wide school population was 53% in 1998. *Id.*

MCPS aimed to achieve racial proportionality at each school through magnet programs and racial bars on transfers. "Magnet programs are designed and located in an effort to avoid racial isolation of students in schools by attracting and/or retaining diverse student enrollment on a voluntary basis to schools outside of the area in which students live." MCPS App. 39a. Restrictions on race are imposed on transfers in order to "avoid the granting of transfers that would contribute to conditions of racial isolation at schools." *Id.*

After applying other screening factors to a transfer application, MCPS considers the race of a student seeking a transfer only if the proposed transfer would contribute to racial isolation at either the sending or receiving school. MCPS Br. 5. Still, diversity concerns resulted in the denial of a large number of transfer requests because of race.[3] In 1998, in additon to Jacob, fourteen other students were barred from transferring from Glen Haven because of their race. JA 165. The "student transfer policy and diversity profile system are applied county-wide and are critical to accomplishing the Board's legitimate education interest in promoting racial and cultural

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[3] MCPS disclosed the exact number in response to a discovery request that was not part of the record before the Fourth Circuit.

diversity among the student population." JA 221-22. "[A]t other schools in other parts of the county African-American students and Hispanic students are screened in the same way that Jacob was screened here for his transfer." JA 185-86. For the 1998-99 school year, children could have been barred from transferring because of their race at 69 out of 183 schools in the county. JA 20-22.

B. The District Court and Fourth Circuit Decisions

Jacob's parents appealed the denial of his transfer request. When a response to the appeal was not received one month before the start of the new school year, Jacob's parents filed a complaint and a motion for a preliminary injunction in the U.S. District Court for the District of Maryland. The complaint sought "[a]n order prospectively prohibiting defendants from barring any person on the basis of race from competing for any transfer available through the school system." JA 15.

After considering lengthy briefs and oral argument, the District Court denied the preliminary injunction. The facts of the case were sufficiently developed for the District Court to conclude that MCPS' interest "in avoiding the creation, through its own action, of segregative enrollment patterns . . . is clearly sufficiently compelling to justify the questioned policy." MCPS App. 27a. Jacob appealed the District Court's decision to the Fourth Circuit asking the appellate court to strike down "that portion of the transfer policy that denies transfer requests solely on the basis of race." Appellant's Brief to the Fourth Circuit at 10. The Fourth Circuit characterized the controlling issue before it in this manner: "The issue in this case is whether the Montgomery County Board of Education may deny a student's request to transfer to a magnet school because of his race. We hold that it may

not." MCPS App. 2a. The court, in a decision which it characterized as "very narrow" (MCPS App. 20a), expressly declined to decide whether diversity or avoidance of isolation is a compelling interest. MCPS App. 13a. Further, the Fourth Circuit stated that it was not enjoining any aspect of the MCPS transfer policy except for its consideration "of the race" of the applicant in granting or denying the transfer." MCPS App. 20a.

Nothing about this decision would have prevented MCPS from continuing to offer transfers to magnet programs in a continuing effort to avoid racial isolation. The Fourth Circuit opined: "If racial imbalance occurs in some of the Montgomery County schools because students like Jacob, for example, are permitted to transfer to magnet schools to get a better education, any racial or ethnic imbalance is a product of 'private choices [and] it does not have constitutional implications.' " MCPS App. 16a (*quoting Freeman v. Pitts*, 503 U.S. 467, 495 (1992)).

MCPS did not seek further review of the decision before the Fourth Circuit. It also did not seek a stay of the decision pending further proceedings in this Court. MCPS decided on December 14 to prohibit all previously allowed transfers within the school system except for limited exceptions which are not relevant here.

REASONS FOR DENYING THE WRIT

This Court should deny MCPS' writ because there is no conflict between the Fourth Circuit decision and decisions of this Court and other courts of appeal; because, the Fourth Circuit properly applied this Court's presumption against the use of racial classifications; and, because case law provides clear guidance for school authorities to follow with respect to diversity in the schools.

Because each of MCPS' asserted grounds for review is devoid of factual and/or legal merit, this Court should decline to review the case.

A. There Are No Conflicts Between the Fourth Circuit's Decision and Decisions of This Court and Other Courts of Appeal

The First Circuit is the only circuit court in addition to the Fourth Circuit to consider the narrow issue of the validity of racial bars where diversity has been assumed to be compelling is the First Circuit. In *Wessman v. Gittens,* 160 F.3d 790 (1st Cir. 1998), that court upheld a challenge to an admissions policy at a public school which employed racial classifications that barred some applicants from admission because of their race. The First Circuit understood that it could only determine whether diversity is a compelling interest by paying "particularized attention" to the facts supporting the need for diversity. 160 F.3d at 798.

Like the policy challenged in *Eisenberg,* the policy in *Wessman* focused "exclusively on racial and ethnic diversity". *Id.* The First Circuit ruled that "[n]o more is needed to demonstrate that [the school board] already has run afoul" of the only opinion of this Court to express support for diversity: " 'The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element.' " *Id.* (*quoting Bakke,* 438 U.S. at 315).[4]

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[4]Other courts also recently have struck down school admission policies that focused exclusively on racial diversity. See *Brewer v. West Irondequoit Central School District,* 32 F. Supp. 2d 619, 631 (W.D. N.Y. 1999) (on appeal to the Second Circuit and

[footnote continued]

"The Policy does precisely what Justice Powell deemed anathematic: at a certain point, it effectively forecloses some candidates from all consideration for a seat at . . . school simply because of the racial or ethnic category in which they fall." 160 F.3d at 800. In reaching this conclusion, the First Circuit emphasized that it was not deciding whether diversity is a compelling interest, *id.*, as did the Fourth Circuit in its decision.

Jacob and a number of other students were foreclosed from the possibility of transferring schools solely because of their race. The First Circuit analysis in *Wessman* directly supports the result reached by the Fourth Circuit in *Eisenberg.*

None of the cases cited by MCPS demonstrates a conflict with decisions of the Court or decisions from other circuits. MCPS first cites *North Carolina State Bd. of Educ. v. Swann,* 402 U.S. 43, 45 (1971) (citing *Swann v. Charlotte-Mecklenburg Bd. of Educ.,* 402 U.S. 1, 16 (1971)), for the proposition that "school authorities have wide discretion in formulating school policy, . . . as a matter of educational policy school authorities may well conclude that some kind of racial balance in the schools is desirable quite apart from any constitutional requirements." The implication is that school districts may take voluntary, race-conscious action to avoid creating racial isolation, including apparently barring students from a public benefit, such as transfers, solely because of their race. Even though Jacob does not dispute the view that school authorities have and need wide discretion in formulating school policy, nothing in the *Swann* school deseg-

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argued on September 4, 1999); *Wooden v. Regents of the University of Georgia,* 32 F. Supp. 2d 1370, 1382 (S.D. Ga. 1999); and, *Equal Open Enrollment Ass. v. Board of Education of Akron,* 937 F. Supp. 700, 707 (N.D. Ohio 1996).

regation line of cases supports a policy that bars students by race from a public benefit in the absence of a predicate constitutional violation.

Swann arose in a State with a "long history of maintaining two sets of schools in a single school system deliberately operated to carry out a governmental policy to separate pupils in schools solely on the basis of race." 402 U.S. at 5-6. In this context, the Court recognized the power of school boards to use various remedies in combating the long history of discrimination. *Id.* at 16. Justice Powell recognized in *Bakke* that "[t]he school desegregation cases are inapposite" to the question of whether a public school's non-remedial interest in "diversity" justifies racial classifications. 438 U.S. at 300.[5] MCPS is a unitary school system lacking the history of discrimination to support the extraordinary remedies upheld by this Court in *Swann*.

In addition, *Wygant v. Jackson Board of Education*, 467 U.S. 267 (1986), has no bearing on the MCPS transfer policy at issue here.[6] Nothing in Justice O'Connor's

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[5]See also *Wessman v. Gittens*, 160 F.3d 790, 796 (1st Cir. 1998): "The Swann Court had no occasion to consider the question, central to this appeal, of whether and to what extent the Constitution circumscribes school officials' discretion to formulate and implement an admissions policy that embraces a particular brand of pluralism."

[6]Similarly, nothing in *Crawford v. Board of Educ. of City of Los Angeles*, 458 U.S. 527 (1982), addresses the validity of race-conscious action that bars an individual from a government benefit under the U.S. Constitution. *Bustop, Inc. v. Board of Educ. of City of Los Angeles*, 439 U.S. 1380 (Rehnquist, Circuit Justice 1978), also did not assess the validity of Los Angeles' bussing plan under the U.S. Constitution. Justice Rehnquist simply denied an application for a stay of the plan because "the complaints of the parents and the children in question are complaints about California state law, and it is in the forums of that State that these questions must be resolved." 439 U.S. at 1383.

statement that states may take voluntary race-conscious action addresses the intersection of that action with a denial of a public benefit to individuals solely because of their race. 467 U.S. at 291.

Washington v. Seattle School District No. 1, 458 U.S. 457 (1982), creates no more of a conflict with the Fourth Circuit decision that does *Swann* or *Wygant*. *Seattle School District* involved a challenge to the constitutionality of a state referendum which sought to overturn a plan to use mandatory bussing by Seattle to achieve racial integration in the public schools. The Court characterized the referendum as "remov[ing] the authority to address a racial problem – and only a racial problem – from the existing decisionmaking body, in a way as to burden minority interests." 458 U.S. at 474. The Court concluded that the referendum "must fall because it does 'not attempt to allocate governmental power on the basis of any general principle' " 458 U.S. at 470 (*quoting, Hunter v. Erickson*, 393 U.S. 385, 395 (1969). "Such a structuring of the political process, the Court said, was 'no more permissible thn [is] denying [members of a racial minority] the vote, on an equal basis with others.' " *Id.* (*quoting, Hunter*, 393 U.S. at 391). The Court expressly declined to pass judgment on the propriety of Seattle's plan to achieve integration through the use of race-conscious student assignments. 458 U.S. at 472 n.15. The Fourth Circuit's decision in *Eisenberg* deals with the violation of individual civil rights, not the unlawful structuring of a political process, and is therefore not at odds with this Court's decision in *Seattle School District*.[7]

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[7] Petitioners view the holdings in *Swann*, *Seattle School District*, and *Crawford*, among others, as "consistent with long-

[footnote continued]

Hunter ex. rel. Brandt v. Regents of University of California, 190 F.3d 1061 (9th Cir. 1999), and *Parents Ass'n of Andrew Jackson High Sch. v. Ambach,* 738 F.2d 574 (2d Cir. 1984), MCPS Br. 21, both address issues not presented in *Eisenberg* and therefore present no conflict with the case. *Hunter* involved a University Elementary School (UES) run by UCLA's Graduate School of Education and Information Studies. Race was considered in the admissions process only "in an attempt to obtain an adequate cross-sample of the general population for the purpose of maintaining the scientific credibility of its scientific studies." *Hunter v. Regents of University of California,* 971 F. Supp. 1316, 1320 (D.C. Cal. 1997). The Ninth Circuit found that "[r]esearch is fundamental to the UES' charter" and agreed with the district court that "the defendants' interest in operating a research-oriented elementary school is compelling." 190 F.3d at 1065. The court recognized the need to defer to researchers' decisions about what they need for their research. *Id.* at 1066.

The research function controlling in *Hunter* is simply not present in *Eisenberg.* MCPS has never asserted at any stage in this litigation, including in its petition for certiorari,[8] that racial classifications are employed for

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standing efforts of Congress to achieve the national goal of elimination, reduction or prevention of minority group isolation in elementary and secondary schools." MCPS Br. 16 n.23. Not only are the cited cases not relevant to the use of racial bars by school authorities, but neither is the scope of permissible congressional action relevant to the power of a local school board. Congress has "unique remedial power" under §5 of the Fourteenth Amendment that is simply not available to any other organ of state or federal government. *City of Richmond v. J.A. Croson,* 488 U.S. 469, 488 (1989).

[8]MCPS identifies a number of areas of additional evidence it would like to have submitted in this case at trial. MCPS Br. at 26.

[footnote continued]

promoting research. Evidence entered in this case shows that the use of racial classifications and the implementation of the transfer policy by MCPS was designed to promote diversity and avoid racial isolation at individual schools, which was not the case in *Hunter*. 971 F. Supp. at 1320.

Andrew Jackson High is similarly not on point with the *Eisenberg* decision. The issue in that case was whether a voluntary policy to promote integration was sufficiently compelling to justify excluding some minority students from schools of their choice. *Parents Ass'n of Andrew Jackson High v. Ambach*, 598 F.2d 705, 719 (2nd Cir. 1979). The Second Circuit concluded that such a purpose was compelling, although it never determined whether the policy itself was valid because of an incomplete factual record. 598 F.2d at 720; and, 738 F.2d at 583.

Andrew Jackson High presents no conflict with the *Eisenberg* decisions for a number of reasons. First, the purported conflict turns on that court's opinion which states that promotion of integration is a compelling interest, which is an issue the Fourth Circuit expressly declined to decide. Similarly, the *Eisenberg* decision and this Court's decision whether to review *Eisenberg* is not directly affected by other circuit court decisions which have held that diversity is not a compelling interest.[9]

None of these areas suggest that MCPS considers the use of racial bars in the transfer policy necessary to support a research function of the school.

[9]See *Lutheran Church-Missouri Synod v. Federal Communications Comm'n*, 141 F.3d 344 (D.C. Cir. 1998); *Hopwood v. Texas*, 78 F.3d 932 (5th Cir.), *reh'g en banc denied*, 84 F.3d 720 (5th Cir.), *cert. denied*, 518 U.S. 1033 (1996).

Andrew Jackson High is also not relevant to the *Eisenberg* decision for the important reason that it applied standards of law which have been superceded by subsequent decisions of this Court. Specifically, the Second Circuit ruled that the School Board could take white flight into account in implementing voluntary action to promote integration. 598 F.2d at 720. This broad view of race-conscious action was rejected by this Court in *Freeman v. Pitts*:

> That there was racial imbalance in student attendance zones was not tantamount to a showing that the school district was in noncompliance with the decree or with its duties under the law. Racial balance is not to be achieved for its own sake. It is to be pursued when racial imbalance has been caused by a constitutional violation.

503 U.S. at 494. Integration can only be pursued as a result of a constitutional violation, not for its own sake as MCPS attempted to do here through its use of racial bars in the transfer policy at issue.[10]

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[10]The Second Circuit also employed an outdated standard for determining whether the race-conscious policy was narrowly tailored to the asserted compelling interest. School authorities were required to show that each component of the transfer plan was "necessary" to achieve the goal of integration. 598 F.2d at 721. The current multiple-pronged test for narrow tailoring was set forth by this Court in *United States v. Paradise*, 480 U.S. 149 (1987).

B. This Court's Presumption against Racial Classifications Was Properly Applied by the Fourth Circuit

MCPS argues that the Fourth Circuit improperly applied the presumption against race-based classifications stated by this Court in *Personnel Administrator of Massachusetts v. Feeny*, 442 U.S. 256 (1979), to shift the burden of proof to MCPS rather than requiring Jacob to demonstrate a violation of his rights. MCPS Br. at 23. However, MCPS makes this assertion without ever showing a willingness in the current petition or in the litigation below to grapple with the key facts which are fatal to its position.

MCPS' transfer policy not only took race into account, it used race to bar transfers for a certain number of students. The use of racial bars is what Jacob challenged, and what the Fourth Circuit characterized as the controlling issue in this case. Jacob retained the ultimate burden of proving the constitutional violation. Proof of the violation was entered in the proceedings through MCPS' own declarations and admissions in court. Jacob met his burden by demonstrating a violation of his rights and those of other students in the Montgomery County school system through the application of the MCPS transfer policy. Consequently, there was no improper shifting of the burden of proof between the parties.[11] MCPS has yet to suggest any evidence that affects the presumption against the racial bar it employed.

MCPS complains that an expedited preliminary injunction proceeding should not "serve as a launch pad" for

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[11] Even if the Fourth Circuit misapplied the *Feeny* presumption, such a misapplication is not a basis for granting certiorari. See Supreme Court Rule 10.

a decision on the merits of a constitutional inquiry calling for careful fact-finding. MCPS Br. 26. However, the additional facts MCPS would have liked to introduce at a trial, *id.*, do not affect the fact that a number of students throughout Montgomery County were barred from transfers solely because of their race.[12] "The fatal flaw in petitioner's preferential program is its disregard of individual rights as guaranteed by the Fourteenth Amendment." *Bakke*, 438 U.S. at 320. The Fourth Circuit correctly noted that it was justified in entering an order for injunctive relief in favor of Jacob without an evidentiary hearing "because the record clearly establishes the plaintiff's right to an injunction and such a hearing would not have altered the result." MCPS App. 20a.

The Fourth Circuit's decision to rule on the merits in reviewing a denial of a preliminary injunction, when viewed in the complete context of the controlling facts and law, is an ordinary function of appellate administration of the law. See *Planned Parenthood of the Blue Ridge v. Camblos*, 155 F.3d 352, 360 (4th Cir. 1998); *Lone Star Steakhouse & Saloon v. Alpha of Virginia*, 43

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[12] Similarly, MCPS' position here is not advanced by its assertion that the Fourth Circuit's conclusion that the transfer policy is administered "with an end toward maintaining [the District-wide] percentage of racial balance in each school" is clearly erroneous. Petitioner's Brief at 25, fn. 26. Putting aside Jacob and MCPS' agreement that racial bars were only instituted within a school after a racial group exhibited a pattern of movement away from the District-wide average over time, nothing about the Fourth Circuit's conclusion changes the fact that a number of students at various schools were denied transfers solely because of their race. If MCPS nevertheless insists that the Fourth Circuit's conclusion was material to its decision, the proper place to seek review of the conclusion was with the Fourth Circuit in the first instance and not with this Court. In any event, Supreme Court Rule 10 provides that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings."

F.3d 922, 938 (4th Cir. 1995); *Barry v. Bean*, 796 F.2d 713, 718 (4th Cir. 1986). MCPS' unhappiness with the Fourth Circuit's decision to rule on the merits is not a sufficient reason for this Court to prolong litigation of MCPS' "barefaced"[13] violation of civil rights, particularly where the Fourth Circuit's decision is well-grounded in undisputed facts and upon a long-established rule of law.

C. The Fourth Circuit Decision is Squarely Within Existing Judicial Guidance on the Use of Racial Bars

Most fairly read, MCPS' plea before this Court is really one of policy preference and not of law. Its petition does not identify a conflict in law between the cases it cites and the Fourth Circuit's decision. Rather, MCPS relies upon dicta in these cases, taken out of context, to support its policy preference to promote diversity and the avoidance of racial isolation through the use of racial bars. A policy preference is simply not a sufficient basis in law for violating the civil rights of students, or for granting certiorari in this case.

At page 27 of its brief, MCPS argues that the Fourth Circuit decision "forces" it to allow parents "unfettered" opportunity to transfer to another school, thereby contributing to racial isolation.[14] This concern does not

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[13] *Wessman*, 160 F.3d at 800, (*quoting People Who Care v. Rockford Bd. of Education*, 111 F.3d 528, 538 (7th Cir. 1997)).

[14] MCPS cites a number of cases on page 18 of its brief in support of its fear that approving transfers which contribute to racial isolation could invite a legal challenge that MCPS engages in intentional discrimination. MCPS has not suggested in this litigation that it has engaged in intentional discrimination, nor has Jacob alleged that it has. This is an issue for a different lawsuit. In any event, the courts in the cases cited by MCPS all drew a con-

[footnote continued]

merit the slightest attention. MCPS runs a school district that has never been the subject of school desegregation litigation; its implementation of the transfer policy was voluntary. Petitioner's Appendix at 36a, 39a.[15] MCPS could simply continue to operate its schools without the transfer policy and not suffer adverse legal consequences. This Court recognized in *Freeman v. Pitts* that racial balancing is only to be pursued in response to a constitutional violation, and not for its own sake as MCPS did here. 503 U.S. 467.[16]

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clusion of intentional discrimination after identifying a number of factors supporting the conclusion. *Keyes v. School District No. 1*, 445 F.2d 990, 1002 (10th Cir. 1971) ("ample evidence in the record [ ] that race was made the basis for school districting with the purpose and effect of producing substantially segregated schools."); *NAACP v. Lansing Board of Education*, 559 F.2d 1042, 1056 (6th Cir. 1977) (eight separate areas of action by the board together supported "[t]he requisite segregative intent or purpose for a constitutional violation."); *Reed v. Rhodes*, 607 F.2d 714, 735 (6th Cir. 1979) ("massive evidence of intentional discrimination"); *Diaz v. San Jose Unified Sch. Dist.*, 733 F.2d 660 (9th Cir. 1984), involved compliance with a state law requirement to eliminate de facto segregation.

[15]MCPS notes that the transfer policy was instituted in response to a complaint filed by one parent with the Office of Civil Rights (OCR) for the U.S. Department of Education. Petitioner's Br. at 4. What petitioner fails to mention is that OCR concluded that MCPS "is not in violation of Title VI of the Civil Rights Act of 1964" with respect to the allegation made in the complaint. JA 99.

[16]MCPS' view about conflicting guidance in this area of civil rights may be based on its misapprehension of the controlling law. The law does not prohibit racial segregation as MCPS asserts on page 27 of its brief. It only prohibits segregation that is the result of intentional discrimination by state actors as this Court made clear in *Freeman*.

Still, the Fourth Circuit made clear that MCPS was not required to disband the transfer policy to magnet schools, only the use of racial bars in the policy. Such a policy would permit MCPS to continue to use magnet schools to avoid racial isolation. MCPS App. 39a. Like the Fourth Circuit's support for a race-neutral transfer policy to magnet schools, this Court has recognized an explicit distinction "between state action that discriminates on the basis of race and state action that addresses, in neutral fashion, race-related matters." *Crawford*, 458 U.S. at 538. If MCPS were to reinstitute a race-neutral transfer policy to magnet schools, parental transfer choices would still be constrained by the other non-racial screening factors included in the transfer policy, factors which the Fourth Circuit explicitly did not enjoin. MCPS App. 20a.

This Court and Courts of Appeals have issued consistent guidance in this area of the law. MCPS will make its own decision about how to follow that guidance. MCPS' dissatisfaction with the guidance is not a sufficient reason for this Court to grant MCPS' petition.

CONCLUSION

The Fourth Circuit's decision in *Eisenberg* represents the continuation of a line of cases running from *Bakke* through *Wessmann* which recognizes that public officials may not pursue diversity in such a manner as to foreclose a public benefit to an individual solely because of race. The decision is also consistent with this Court's guidance in *Crawford* and *Freeman*. It is not at odds with any identified court of appeals decision.

Perhaps just as importantly, this case does not present the most important constitutional issue in this area of the law: whether diversity could ever be a compelling interest

for equal protection purposes. The Fourth Circuit had no reason to reach this decision. Even if diversity is a compelling interest, the outcome in this case would still be the same under the standards articulated by Justice Powell in *Bakke*.

MCPS identifies a number of cases that are currently proceeding through the federal courts which might present the question of whether diversity is a compelling interest. MCPS Br. 22, n.25. This important area of the law would be better addressed in a case which squarely considers the question of whether diversity is a compelling interest.

For the foregoing reasons, this Court should deny petitioner's application for a writ of certiorari and let the Fourth Circuit decision stand as part of a consistent and growing body of jurisprudence which supports equal protection of the law for public school students.

Respectfully submitted,

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